Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JACK CUMMINGS; RALPH BEST; BILLY RODGERS; BRUCE HENRY; and TERRY M. WALTERS,

Petitioners,

v.

DEKALB COUNTY; JAMES PIERCE, individually and in his former official capacity as Executive Assistant to the Chief Executive Officer; CLIFF PRUETT, individually and in his former official capacity as Associate Director for the Water and Sewer Department; and RICHARD CONLEY, individually and in his official capacity as Director, Merit System and Personnel Administration,

Respondents.

On Petition For Writ Of Certiorari To the United States Court Of Appeals, Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Substantive Due Process component of the Fourteenth Amendment may be invoked by public employees when their employment is arbitrarily terminated.

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No. _____

In The

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JACK CUMMINGS; RALPH BEST; BILLY RODGERS; BRUCE HENRY; and TERRY M. WALTERS,

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v.

DEKALB COUNTY; JAMES PIERCE, individually and in his former official capacity as Executive Assistant to the Chief Executive Officer; CLIFF PRUETT, individually and in his former official capacity as Associate Director for the Water and Sewer Department; and RICHARD CONLEY, individually and in his official capacity as Director, Merit System and Personnel Administration,

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On Petition For Writ Of Certiorari To the United States Court Of Appeals, Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

COME NOW Jack Cummings, Ralph Best, Billy Rodgers, Bruce Henry and Terry M. Walters and respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeal (App. 3A) is reported at 24 F.3d 1349 (1994). The opinion of the United States District Court for the Northern District of Georgia (App. 20A) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on July 5, 1994, and a petition for rehearing was denied on August 11, 1994. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

United States Constitution, Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Statement of Facts

The five plaintiffs in this case are former employees of the Dekalb County Public Works Water and Sewer Department who were terminated as part of an alleged reduction in force when the Water and Sewer Department was abolished in its entirety.

It was and is their contention that they were eliminated so that defendants could be rid of one employee, one Maury Winkler. As the District Court explained:

> . . . There is some evidence that defendants Dekalb County, through its then Chief Executive Officer, Manuel Maloof, and Pierce and Pruett, wanted to get rid of Mr. Winkler, and those who supported him. Statements allegedly made by defendants reveal an intent to "get" Mr. Winkler, and to eliminate Planning and Engineering so that it could be reconstituted under a different name, with a manager other than Mr. Winkler. Despite the budgetary reasons advanced for the decision, at the administrative hearing, defendants were unable to provide any details as to the need for the elimination of Planning and Engineering . . .

(App. 32-33A).

Indeed, there was evidence that the work had simply been shifted over to another department in a process similar to that condemned in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982), as constituting a violation of substantive due process.

Proceedings Below

This case was brought under 42 U.S.C. § 1983, where plaintiffs alleged *inter alia* a violation of their substantive due process rights by defendants. (Plaintiffs made no claim that their procedural due process rights had been violated).

On defendants' motion for summary judgment, the District Court denied defendants' motion in relevant part (App. at 43A). Defendants appealed the denial of their motion for qualified immunity and the Eleventh Circuit took pendant jurisdiction of the other claims.

Prior to the decision of the panel, the en banc court decided *McKinney v. Pate*, 20 F.2d 1550 (11th Cir. 1994) (en banc). (That case is now pending on petition for writ of certiorari under the name *McKinney v. Osceola County Board of County Commissioners*, 94-568 ___ U.S. ___ (1994)).

The Court held:

> Plaintiffs' claim that the defendants violated their substantive due process rights is now precluded by *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc). As stated in *McKinney*, '[b]ecause employment rights are state-created rights and are not "fundamental" rights created by the Constitution, they do not enjoy substantive due process protection.' Consequently,

defendants Pierce, Pruett and DeKalb County are entitled to summary judgment on plaintiffs' substantive due process claims.

(App. at 14A).

ARGUMENT SUPPORTING THE GRANT OF THE WRIT

I. INTRODUCTION

There has never been agreement in the lower courts whether public employees can invoke the protection of substantive due process under the Fourteenth Amendment.

Prior to the splitting of the old Fifth Circuit into the Fifth and Eleventh Circuits, case law in the Fifth Circuit held that an employee could not be discharged where the school board acted arbitrarily. *Roane v. Callisburg Independent School District*, 511 F.2d 633, 639 (5th Cir. 1975). The Eleventh Circuit agreed in *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332-1333 (11th Cir. 1982) and *Barnett v. Housing Authority*, 707 F.2d 1571, 1577-1578 (11th Cir. 1983). It was this line of cases which the Eleventh Circuit overruled en banc in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). The panel in the instant case simply followed *McKinney*.

In *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19 (1st Cir. 1989), the Court employed substantive due process analysis and held that a public employee's right to the protection of substantive due process was clearly established. *Id.* at 24-25.

> In reaching this conclusion, we recognize that the courts are not yet unanimous on whether this substantive right exists . . . and that the Supreme Court several times in the last decade has sidestepped the question of whether the Fourteenth Amendment provides substantive protection against arbitrary and capricious academic decisionmaking.

The Court cited *Barnett, supra* and cases from the Second, Tenth, Sixth, Eighth and Fourth Circuits as holding

> that the Fourteenth Amendment protects public employees from arbitrary and capricious government action affecting their employment.

Id. at 25. The Court noted that the Seventh Circuit was a conspicuous exception. *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983).

That same year the Third Circuit characterized the debate as follows:

> the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court and is subject to varying analyses and conclusions by the lower courts.

Reich v. Beharry, 883 F.2d 239, 243 (3rd Cir. 1989). Again, *Barnett* was cited. The Court went on to hold that "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." *Id.* at 244. In *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951 (7th Cir. 1988), the Court again refused to

hold that "substantive due process protects state-created property rights", *id.* at 957. Yet,

> The Supreme Court has not yet provided clear guidance on whether the arbitrary deprivation of a property interest will implicate substantive due process when the plaintiff does not challenge the constitutionality of the statutory scheme.

Id. at 956.

The case law in the Circuits and elsewhere, *see infra* at page 11, is in hopeless disarray and demands that this Court provide guidance on the issue. *See e.g. United Brotherhood v. United States*, 330 U.S. 395, 400 (1947).

II. McKINNEY'S HOLDING THAT STATE CREATED PROPERTY RIGHTS ARE NOT ENTITLED TO SUBSTANTIVE DUE PROCESS PROTECTION IS CONTRARY TO SUPREME COURT AUTHORITY AND WAS ERRONEOUSLY APPLIED IN THIS CASE.

The Due Process clause forbids the deprivation of liberty *and property* without due process of law. "[T]he amendment provides two different types of constitutional protection: procedural due process and substantive due process." *McKinney*, 20 F.3d at 1555, citing *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990). The essence of *McKinney* is that "property" rights, (apparently in distinction to "liberty" rights) are not entitled to "substantive" due process protection: "we . . . cannot find that McKinney's state-created property right is deserving of substantive due process protection." 20 F.3d 1561. This holding is incorrect.

The *McKinney* court's analysis is flawed in several respects. The most glaring error is that it interprets the due process clause as posing no bar to state actors from arbitrarily and irrationally depriving citizens of their property. This interpretation of the Fourteenth Amendment is at odds with well settled law of this Court.

The doctrine of substantive due process limits governmental action in at least four categories of conduct:

(a) conduct which arbitrarily and irrationally deprives citizens of their property. *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928) (same); *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979); *Ewing v. Board of Regents*, 474 U.S. 214 (1985).

(b) conduct that infringes on the freedoms/liberties enumerated in the Bill of Rights, *Palko v. Connecticut*, 302 U.S. 319 (1937); *Duncan v. Louisiana*, 391 U.S 145 (1968).

(c) conduct that infringes on certain unenumerated rights such as privacy, abortion, etc. *Roe v. Wade*, 410 U.S. 113 (1973).

(d) conduct which "shocks the conscience" *Rochin v. California*, 342 U.S. 165 (1952).

The last three of these categories of conduct restricted by the substantive component of the due process clause involve primarily "liberty" interests, which are either expressly or implicitly created by the Constitution itself.

The *McKinney* Court's error regarding substantive due process lies in its utter failure to acknowledge the first category of proscribed conduct – arbitrary and irrational governmental conduct – which deprives citizens of

their "property". This line of cases requires governmental action to be "rational", that is, that it bear some minimal relationship to a permissible governmental purpose:

> This strand of the 'substantive' due process doctrine is composed of two parts: rationality limitations and normative limitations on government power. Every law or governmental act must be reasonably related to its end, and thus not 'arbitrary' . . . [E]very government action must be rationally related to its end, and ends that 'shock the conscience' or otherwise violate the norms 'implicit in the concept of ordered liberty' are illegitimate.

Brennan v. Stewart, 834 F.2d 1248, 1256 (5th Cir. 1988).

Notwithstanding *McKinney's* apparent disdain for state-created property rights (at least in the employment context) such rights *are* fundamental, that is, "implicit in the concept of ordered liberty." This Court, in fact, has spoken directly to central nature "property" plays in our society:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972). The key role of the concept of "property" in our society was also addressed by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that case, too, this Court again confirmed the central role of property in a civilized society:

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, *reliance that must not be arbitrarily undermined.* 408 U.S. at 577. (Emphasis added).

In short, property rights cannot be "arbitrarily" taken by governmental actors. If it were otherwise, there would be no "ordered liberty."

Numerous decisions of this Court and other courts confirm that substantive due process prohibits arbitrary and capricious governmental conduct, specifically including the arbitrary deprivation of "property." *See, Euclid v. Amber, supra; Nectow v. Cambridge, supra; National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451 (1988); *Parkway Garage v. City of Philadelphia*, 5 F.3d 685 (3d Cir. 1993) (alleged arbitrary deprivation of real estate for improper motive); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989) (alleged arbitrary and capricious deprivation of tavern license); *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337 (7th Cir. 1987); *Miller v. City of Chicago*, 774 F.2d 188 (7th Cir. 1985); *Diaz v. U.S. Postal Service*, 853 F.2d 5 (1st Cir. 1988); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990); *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991); *Brennan v. Stewart*, 834 F.2d 1248 (5th Cir. 1988) (alleged arbitrary deprivation of training permit); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir.

1986) (alleged arbitrary deprivation of building license); *Oklahoma Educ. Ass'n v. Alcoholic Beverages Law Enforcement Council*, 889 F.2d 929 (10th Cir. 1989) (alleged irrational ban on teacher employment in liquor industry); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). State court decisions are to the same effect:

> State court decisions are legion in which [property deprivations] have been struck down on the ground that they deprive a landowner of property without due process of law, usually accompanied with statements that the regulations are 'unreasonable', 'arbitrary', or 'capricious.' . . . Hundreds, if not thousands of state cases could be cited in which courts have applied a substantive due process test to zoning ordinances . . . "

Cunningham, *Property*, (1984), p. 523.

A vested right to a position of public employment is no less "property" than the real property at issue in the preceding cases, and undeniably warrants "procedural" due process protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). "The Supreme Court has held repeatedly that the property interest in a person's means of livelihood is one of the most significant benefits that an individual can possess." *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1348 (6th Cir. 1992).

Like the arbitrary deprivation of real or personal property, the doctrine of substantive due process has also been held to proscribe the arbitrary deprivation of vested employment rights. *Harrah v. Indep. Sch. Dist., supra; Ewing v. Board of Regents, supra.*

The Eleventh Circuit's earlier decisions in *Hearn* and *Barnett* are faithful to historical substantive due process analysis requiring rational governmental conduct and prohibiting arbitrary governmental conduct. In *Hearn* (the seminal Eleventh Circuit "employment" substantive due process case), the Court held that the "deprivation of a property interest by means that [are] pretextual, arbitrary and capricious, and, because unrelated to the proper reasons . . . without any rational basis" constitutes a violation of substantive due process. 688 F.2d at 1322. For this proposition, the Court cited to *Nebbia v. New York*, 291 U.S. 501 (1933), which held that:

> The guaranty of due process . . . demands that the law shall not be unreasonable, arbitrary, or capricious.

Although cited in the en banc *McKinney* decision, this holding, and the larger concept embodied in it, that is, the principle that citizens have the right to expect government not to deprive them of property interests without a rational basis for doing so, is simply ignored by the en banc *McKinney* court. No rational explanation for treating employment as an inferior species of property is offered by the *McKinney* Court.

Arbitrary government conduct which deprives citizens of their property is clearly forbidden by the substantive component of the due process clause. The bottom line reason why is simple: such conduct "shocks the conscience". As noted previously by another Judge in the Northern District of Georgia,

> A plaintiff alleging that the decision to terminate him was pretextual, arbitrary and capricious has 'alleged more than a simple

> deprivation of a state created property interest' – he has alleged that the government has engaged in unconscionable conduct. *Jones v. City of East Point*, 795 F.Supp. 408, 416 (N.D.Ga. 1992).

This assessment is clearly correct: allowing government actors to deprive citizens of their property (whether it be land or employment) for wholly arbitrary and capricious reasons would undermine the most basic of institutions upon which citizens rely in their day to day lives. As recognized previously by the Eleventh Circuit:

> The Fourteenth Amendment . . . must draw its meaning from evolving standards of decency that mark the progress of a maturing society. *Taylor v. Ledbetter*, 813 F.2d 791, 797 (11th Cir. 1987) (en banc).

Respectfully, *McKinney* represents a gross departure from this approach to the due process clause. It is completely contrary to both *Ewing*, *supra*, and *Harrah*, *supra*. This Court should accordingly grant the petition and vacate in part the judgment below.

CONCLUSION

It has long been the rule in the Eleventh Circuit and in most other Courts that public employees may not be deprived of their property interest in their employment arbitrarily and capriciously by their governmental employer. That is, they were entitled to invoke the protection of substantive due process as any other property owner might do.

The law is in hopeless conflict. The issue is obviously a recurring one. The petition should be granted and the judgment of the Eleventh Circuit Court of Appeals reversed.

Dated: Decatur, Georgia, November 9, 1994.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8585

JACK CUMMINGS; RALPH BEST; BILLY RODGERS; BRUCE HENRY; TERRY M. WALTERS,

Plaintiffs-Appellees,

versus

DEKALB COUNTY; JAMES PIERCE, individually and in his former official capacity as Executive Assistant to the Chief Executive Officer; CLIFF PRUETT, individually and in his former official capacity as Associate Director for the Water and Sewer Dept.; and RICHARD CONLEY, individually and in his official capacity as Director, Merit System and Personnel Administration,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed Aug. 11, 1994)

Before KRAVITCH and CARNES, Circuit Judges, and HAND* Senior District Judge.

PER CURIAM:

The petition for rehearing filed by Plaintiffs-Appellees, is denied.

/s/ Phyllis Kravitch
U.S. Circuit Judge

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*Honorable W. B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

Jack CUMMINGS, Ralph Best, Billy Rodgers, Bruce Henry and Terry M. Walters, Plaintiffs-Appellees,

v.

DeKALB COUNTY, James Pierce, Cliff Pruett and Richard Conley, Defendants-Appellants.

No. 93-8585.

United States Court of Appeals,
Eleventh Circuit.

July 5, 1994.

Former employee of county brought § 1983 action against county and its officials alleging violations of free speech and association, substantive due process, and equal protection rights, as well as state constitutional law, arising from their discharge pursuant to reduction in force. The United States District Court for the Northern District of Georgia, No. 1:91-cv-1639-HTW, Horace T. Ward, J., granted in part and denied in part defendants' motions for summary judgment, and defendants appealed. The Court of Appeals, Hand, Senior District Judge, sitting by designation, held that: (1) county merit system director was entitled to qualified immunity with respect to claim that he violated employee's "liberty right" to seek demotion; (2) officials were entitled to qualified immunity with respect to freedom of association claims; (3) employees' employment rights did not enjoy substantive due process protection; and (4) under Georgia law, officials were entitled to official immunity with respect to state constitutional claims.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and CARNES, Circuit Judges, and HAND*, Senior District Judge.

HAND, Senior District Judge.

In this action, former employees of the DeKalb County Public Works asserted claims under 42 U.S.C. § 1983 for First Amendment (free speech and association) and Fourteenth Amendment (substantive due process and equal protection) violations, as well as state law constitutional claims, arising from their termination pursuant to a reduction-in-force in which the thirty-four positions comprising the Planning & Engineering Division of the Water & Sewer Department were eliminated. These claims were asserted against DeKalb County as well as James Pierce, the former Executive Assistant to the Chief Executive Officer of DeKalb County, Cliff Pruett, the former Associate Director of the Water & Sewer Department, and Richard Conley, the Director of the DeKalb County Merit System and Personnel Administration Department. Pierce, Pruett and Conley were sued in their individual and official capacities.

The district court granted summary judgment in favor of the defendants on plaintiffs' free speech and equal protection claims and in favor of DeKalb County on plaintiffs' state law claims. The district court denied summary judgment to each of the defendants on plaintiffs' freedom of association and substantive due process

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*Honorable W. B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

claims. The district court also denied summary judgment to Pierce, Pruett and Conley on their claims for legislative and qualified immunity and plaintiffs' state law claims. It is from this order that defendants appeal.[1] We reverse the denial of summary judgment for the defendants.

I. BACKGROUND

Jack Cummings, Ralph Best, Billy Rodgers, Bruce Henry and Terry Walters, former employees of the DeKalb County Public Works, Water & Sewer Department, Planning & Engineering Division, were terminated in March 1990 when the DeKalb County Board of Commissioners (Board) adopted the 1990 County budget recommended by the then Chief Executive Officer of DeKalb County (CEO), Manuel J. Maloof. The budget contained a proposal to reorganize the Water & Sewer Department by eliminating the 34 positions in the Planning & Engineering Division, transferring certain functions of the Planning & Engineering Division to the Construction & Maintenance Division, and adding 12 new positions to the Construction & Maintenance Division to accommodate the new job duties and responsibilities. The total reduction-in-force therefore consisted of 22 employees. Cliff Pruett, the former Associate Director of the Water & Sewer Department and a named defendant in this action, recommended this overall reorganization of the Water & Sewer Department to Maloof, who is not a party to this suit.

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[1] No cross-appeal has been filed by the plaintiffs.

The Board, at its meeting on February 27, 1990, approved the CEO's recommended budget but adopted the recommendation of its own budget review committee that the Planning & Engineering Division not be eliminated pending further study. On March 5, 1990, pursuant to Section 15(a) of the DeKalb Organizational Act, CEO Maloof vetoed the action taken by the Board on February 27, 1990, and thus abolished all Planning & Engineering Division positions by eliminating any funding in the 1990 budget for such positions. On March 13, 1990, the Board tried but failed to obtain the necessary two-thirds vote of the Board's total membership to override the CEO's veto. The Board did, however, extend to March 16, 1990, the effective date of termination for the employees whose positions were eliminated under the 1990 budget. The employees affected by this reduction-in-force were notified by Pruett on March 14, 1990, that their employment would be terminated effective March 16, 1990.[2] The termination notice was approved by James Pierce, a named defendant in this action, who was at that time the Executive Assistant to CEO Maloof.

The plaintiffs appealed their terminations and were granted a consolidated hearing on May 17-18, 1990, before the Personnel Review Panel, a body established by the DeKalb County Code to hear disciplinary actions and reduction-in-force appeals brought by permanent merit

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[2] Pruett had earlier advised the employees in the Planning & Engineering Division by letter dated February 14, 1990, of the County's intent to terminate their employment effective February 27, 1990, if the budget passed, as part of a reduction-in-force.

system employees. The Personnel Review Panel was comprised of three randomly selected county employees, none of whom were employed in the department of the appealing party. Plaintiffs were represented by counsel at this hearing, presented documentary evidence and both called and cross-examined witnesses. On May 21, 1990, the Personnel Review Panel unanimously affirmed plaintiffs' termination and made four specific findings of fact based on the testimony and evidence presented:

> (1) [T]here was a decreasing need for planning, design and engineering functions. As a result, there was a shifting of emphasis which led to a reorganization within the Water & Sewer Division;
>
> (2) Review of documents developed by the County Finance Dept. reflected that the elimination of the Planning & Engineering Section would result in greater cost control and a considerable annualized cost savings to the County;
>
> (3) [T]he County Board of Commissioners did not appropriate funds for the continuation of the Planning and Engineering Section of the Water and Sewer Division for the year 1990;
>
> (4) The Personnel Review Panel did not find, through any of the evidence submitted, that discrimination on the basis of age, difference of opinion, or any other non-merit factors were motivating reasons for the action taken against any of the appellants.

Exhibit E to Defendants' Motion for Summary Judgment. Plaintiffs did not appeal the panel's decision to the DeKalb County Superior Court as permitted under the DeKalb County Code. This lawsuit followed.

II. JURISDICTION

This appeal presents issues of the individual defendants' entitlement to qualified immunity from plaintiffs' federal claims under 42 U.S.C. § 1983 and to state official immunity from plaintiffs' state law claims, both of which are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815-16, 86 L.Ed.2d 411 (1985) (denial of a claim of qualified immunity is immediately appealable); *McKinney v. DeKalb County*, 997 F.2d 1440, 1442 (11th Cir. 1993) (same); and *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir.1992) ("Because sovereign immunity under Georgia law is an immunity from suit . . . we have jurisdiction over the district court's order denying summary judgment based on sovereign immunity under Georgia law.").[3]

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[3] Plaintiffs argue that we lack jurisdiction over any claim other than the claims of Pierce, Pruett and Conley for qualified immunity. Plaintiffs specifically contend that the denial of summary judgment on the state sovereign immunity claims of Pierce, Pruett and Conley is not appealable despite *Griesel*, because *Griesel* was incorrectly decided. Plaintiffs' contention that, contrary to *Griesel*, the state sovereign immunity claims constitute merely a defense from liability and not an immunity from suit is not supported by the Georgia cases cited in support thereof. *See e.g., Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878, 879 (1980) (" 'Any suit against an officer or agent of the State, in his official capacity, . . . is a suit against the State' . . . and **cannot be maintained** without its consent."); *Strickland v. Wilson*, 205 Ga.App. 91, 93, 421 S.E.2d 94, 96 (1992) ("the doctrine of official immunity may bar the suit."). Even if we agreed that *Griesel* was wrongly decided, we are nonetheless bound by that decision. *See e.g., Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc); *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir.1994). Plaintiffs also misapply the jurisdictional

Despite plaintiffs' contentions to the contrary, we also find it appropriate to exercise our discretionary pendent jurisdiction to review the district court's denial of summary judgment to DeKalb County. *Andrews v. Employees' Retirement Plan of First Alabama Bancshares, Inc.*, 938 F.2d 1245, 1247-48 (11th Cir.1991) ("this court has jurisdiction to review a non-appealable aspect of a district court order when that order is otherwise properly before the court."); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir.1990) (considerations of judicial economy support the exercise of pendent jurisdiction over the sovereign immunity issue); *Broughton v. Courtney*, 861 F.2d 639, 641 (11th Cir.1988) (issues pendent to the immunity issue may be heard in order to avoid an unnecessary trial).

III. STANDARD OF REVIEW

The issues pertaining to Pierce's, Pruett's and Conley's entitlement to summary judgment based on qualified or official immunity are reviewed *de novo*. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556 (11th Cir.1993). Defendants' entitlement to summary judgment on those claims not barred by immunity is also reviewed *de novo* inasmuch as we "are bound by the same standards that

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limitations identified in *McKinney v. DeKalb County*, 997 F.2d 1440, 1442 (11th Cir.1993), namely that "sovereign immunity does not shield governmental entities from suit in a § 1983 action alleging inadequacy of an official policy or custom." It is Pierce, Pruett and Conley, and not defendant DeKalb County, who seek entitlement to state official immunity from plaintiffs' state law claims.

governed the district court on the summary judgment motion below." *Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1377 (11th Cir.1994), *citing, Early v. Champion Int'l Corp.,* 907 F.2d 1077, 1080 (11th Cir.1990); *Lowe v. Aldridge,* 958 F.2d 1565, 1569 (11th Cir.1992). *See also, Leeks v. Cunningham,* 997 F.2d 1330, 1332 (11th Cir.1993) ("In deciding whether the district court erred, our task, as was the trial court's, is to ascertain whether the record reveals that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.").

IV. DISCUSSION

A. Walters' claim against Conley

The only claim pursued against Richard Conley, the Merit System Director, is a claim that Conley violated Terry M. Walters' "liberty right to seek a voluntary demotion" (Appellees' Brief at 12) by impermissibly conditioning Walters' acceptance of a demotion on Walters' waiver of any right to sue the defendants in connection with his termination. Walters contends that, pursuant to Ordinances 20-123 and 20-127 of the DeKalb County Code,[4] he

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[4] DeKalb County Ordinance 20-123 permits the filling of a vacancy by the transfer of a permanent or probationary employee from another identical or comparable class. In contrast, DeKalb County Ordinance 20-127 provides:

> A permanent or probation employee **may request** appointment to a lower class, and the department head **may make the demotion** subject to the limitations applicable to transfers. A department head **may demote** a permanent . . . employee when a shortage of

"sent a letter saying he would accept a demotion (R-2-13, Walters affidavit), although the letter is not in the record, but he wanted to retain all rights of appeal of any kind; either in the Department, the County, and the Georgia and Federal Courts." (Appellees' Brief at 13). Conley responded to Walters' letter by advising him that "[u]sing the statement 'will accept' is not acceptable nomenclature to have a voluntary demotion personnel action effected as such implies that the employees in some way have been required to accept demotion." (Appellees' Brief at 13).

The county ordinances relied upon by Walters require an employee to request a demotion and permit, rather than mandate, the head of a department to grant such a request. Walters "acceptance" of a demotion while essentially threatening to sue defendants in connection with the very circumstances which led to such demotion does not constitute by any stretch of the imagination a request for a demotion. Consequently, Conley has violated no "clearly established statutory or constitutional rights of which a reasonable person would have known" with respect to Walters and is thus entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Post*, 7 F.3d at 1556. The district court erred in failing to grant summary judgment in favor of Conley.

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work or funds, the abolition of a position, or other material change in duties or organization necessitates the action.

(Emphasis added.)

B. First Amendment Association Claims

Plaintiffs claim that Pierce, Pruett and DeKalb County violated their First Amendment right to associate with Maury Winkler, who was also terminated when the Planning & Engineering Division was eliminated but is not a party to this litigation. It is the plaintiffs' contention that the elimination of the Planning & Engineering Division was solely a ploy to get rid of Maury Winkler.

There exist two different forms of association which are granted special protection under the First Amendment: to-wit: "intimate association" and "expressive association." *McCabe v. Sharrett*, 12 F.3d 1558, 1562-63 (11th Cir.1994), *citing, Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249-50, 82 L.Ed.2d 462 (1984); and *City of Dallas v. Stanglin*, 490 U.S. 19, 23-25, 109 S.Ct. 1591, 1594-95, 104 L.Ed.2d 18 (1989). As emphasized in *McCabe:*

> At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family – marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. [*Roberts*, 468 U.S.] at 619, 104 S.Ct. at 3250. Whether the right extends to other relationships depends on the extent to which those attachments share the qualities distinctive to family relationships, such as 'relative smallness' and 'seclusion from others in critical aspects of the relationship.' *Id.* at 620, 104 S.Ct. at 3250. The right of expressive association – the freedom to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of

> grievances, and the exercise of religion – is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms. . . . Therefore, a plaintiff . . . can obtain special protection for an asserted associational right if [he] can demonstrate either that the asserted association closely enough resembles a family relationship to be protected by the right to intimate association, or that the purpose of the association is to engage in activities independently protected by the First Amendment.

McCabe, 12 F.3d at 1563.

As applied to this action, plaintiffs have neither alleged in their complaint nor presented any evidence to establish the existence at any time of an association between any of the plaintiffs and Maury Winkler which is entitled to special constitutional protection. Consequently, neither Pierce nor Pruett has violated any "clearly established statutory or constitutional rights of which a reasonable person would have known" with respect to plaintiffs and each is thus entitled to qualified immunity. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738; *Post*, 7 F.3d at 1556. Plaintiffs have also failed to establish any basis on which DeKalb County could be held liable under § 1983 for a violation of plaintiffs' rights to associate. The district court erred in failing to grant summary judgment in favor of Pierce, Pruett and DeKalb County on plaintiffs' freedom of association claims.

C. Substantive Due Process Claim

Plaintiffs' claim that the defendants violated their substantive due process rights is now precluded by *McKinney v. Pate*, 20 F.3d 1550 (11th Cir.1994) (en banc).[5] As stated in *McKinney*, "[b]ecause employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection." *Id.* at 1560. Consequently, defendants Pierce, Pruett and DeKalb County are entitled to summary judgment on plaintiffs' substantive due process claims.

D. Section 1983 Claims

In order for the plaintiffs to avoid summary judgment in favor of the defendants on their claims under 42 U.S.C. § 1983, they were required to show "the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Trautvetter v. Quick*, 915 F.2d 1140, 1148 (7th Cir.1990), *quoting*, *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988). *See also*, *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) ("§ 1983 ' "is not itself a source of substantive rights,' but merely provides 'a method of vindicating federal rights elsewhere conferred'."), *quoting*, *Baker v. McCollan*, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 2694, n. 3, 61 L.Ed.2d 433 (1979). For the reasons

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[5] Unlike *McKinney*, plaintiffs do not allege a violation of procedural due process rights.

stated above, plaintiff failed to show a violation of any right secured by federal law. Consequently, the district court erred in denying defendants' motion for summary judgment on plaintiffs' § 1983 claims.

E. State Law Claims against the Individual Defendants

The parties agree that the proper standard of immunity to be applied under Georgia law to the discretionary acts of Pierce, Pruett and Conley is stated in *Hennessey v. Webb*, 245 Ga. 329, 330-331, 264 S.E.2d 878, 880 (1980), namely:

> [W]here an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is . . . usually given immunity from liability to persons who may be injured as the result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority, and **without wilfulness, malice, or corruption.**

(Emphasis in original). *See also, City of Atlanta v. Chambers*, 205 Ga.App. 834, 839, 424 S.E.2d 19, 24 (1992) ("The record in the present case is utterly devoid of any conduct by [the Commissioner] which could remotely be construed as being sufficient to lift the shield that protects officers acting colore officii.").

Plaintiffs do not dispute that the acts complained of with respect to Pruett and Pierce, to-wit: the recommendation regarding reorganization and the approval of the letter of termination, respectively, were discretionary.

Plaintiffs do argue that Conley's action was not discretionary because his "duty was simply to process [Walter's] transfer request[ ]," (Appellees' Brief at 46), but such argument is, for the reasons discussed above, without merit.

The district court's decision to deny Pierce's, Pruett's and Conley's motion for summary judgment on the state law claims was predicated solely on the conclusion that a genuine issue of material fact exists as to "whether [the individual] defendants willfully and/or maliciously violated plaintiffs' constitutional rights." (District Court's Order at 26). However, plaintiffs submitted no evidence from which malice could be inferred relative to Conley's actions. Plaintiffs did submit as evidence of malice on the part of Pierce and Pruett two affidavits alleging certain statements by Pierce and Pruett relating to Maury Winkler.[6] There is, however, no evidence of any animus towards the plaintiffs by Pierce or Pruett or towards either Maury Winkler or the plaintiffs on the part of the

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[6] In one affidavit, Pearson G. Sides, an engineer in the former Planning and Engineering Division who is not a party herein, testified to being the recipient of the following statement by defendant Pierce: "A lot of people have tried to get Maury and it didn't stick. I'm going to get him, and it's going to stick because I'm a lot smarter than they were." Sides does not indicate either a date or time at which this alleged statement was made. In the other affidavit. Bruce Henry, a plaintiff herein, testified to having overheard "in the winter of 1988," approximately two years prior to the reduction-in-force at issue in this litigation, a statement by Pruett that he would give Gwinnett County capacity in the Pole Bridge Plant if they would take Maury Winkler off his hands.

Board of Commissioners, the persons ultimately responsible for the reduction-in-force.

Contrary to plaintiffs' assertions, the Board of Commissioners was ultimately responsible for the decision to reorganize and to eliminate the Planning & Engineering Division by its failure to override the CEO's veto as provided by Section 15(b) of the DeKalb County Organizational Act. Pierce and Pruett lacked any authority to implement such a plan. The district court therefore erred in its conclusion that, by virtue of Pruett's recommendation to CEO Maloof and Pierce's mere approval of the termination letters sent by Pruett, Pierce and Pruett possessed final decision-making authority "in regard to plaintiffs' termination." (District Court's Order at p. 19).

Even if Pierce and Pruett had been vested with the ultimate authority to implement the reorganization plan and terminate the plaintiffs, the evidence proffered by the plaintiffs is insufficient to create a question of fact concerning malice in connection with the reorganization. In their affidavits, Pearson G. Sides does not state when Pierce made the alleged statement about Maury Winkler while Bruce Henry admits that the alleged statement by Pruett was made "in the winter of 1988," approximately two years prior to the reduction-in-force at issue in this litigation. There exists, therefore, no evidence in this record to intimate that these statements were made within a time frame relevant to the reorganization and reduction-in-force at issue in the case.[7]

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[7] Plaintiffs have submitted no evidence to establish that the business reasons given for the reorganization were not legitimate, such as evidence that any engineering positions, other than the 12 positions added to the Construction & Maintenance

Consequently, the district court erred in denying summary judgment in favor of not only Conley but Pruett and Pierce on plaintiffs' state law claims. Pierce, Pruett and Conley are entitled to state law immunity in connection with the recommendation regarding reorganization, the approval of the letter of termination and the failure to process Walters' letter as an application for demotion, respectively.

CONCLUSION

Because we have determined that the individual defendants, Conley, Pruett and Pierce, violated no clearly established statutory or constitutional rights of the plaintiffs, these individual defendants are entitled to federal qualified immunity from suit. Because we have also determined that no evidence was submitted from which the requisite malice could be inferred, Conley, Pruett and Pierce are also entitled to state law immunity from suit.

Division, were created subsequent to the elimination of their positions and that DeKalb County did not therefore enjoy the benefit of a total reduction-in-force of 22 employees in the Water & Sewer Department as planned by the reorganization. Although plaintiffs allege that a facsimile of the former Planning and Engineering Division has been reconstituted under the name of Production and Technical Services, no evidence has been presented to support this general contention. Nor have plaintiffs presented any evidence to establish that the 12 employees assigned to the Construction & Maintenance Division to accommodate the two functions of the former Planning & Engineering Division which were transferred to that division under the reorganization (private development review and surveying support) were required to perform any functions eliminated under the reorganization.

Finally, because we have determined that plaintiffs have failed to demonstrate the existence of a genuine issue of material fact, each of the defendants is entitled to summary judgment on plaintiffs' first amendment association, substantive due process, § 1983 and state law claims. Accordingly, the district court's denial of summary judgment to Conley, Pruett, Pierce and DeKalb County on these claims is REVERSED and the case is REMANDED for the entry of a judgment consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK CUMMINGS, et al.,	:	CIVIL ACTION
Plaintiffs	:	1:91-cv-1639-HTW
vs.	:	(Filed Mar. 1, 1993)
DEKALB COUNTY, et al.,	:	
Defendants	:	

ORDER OF COURT

This matter is presently before the court on the motion for summary judgment filed by defendants Dekalb County ("the County"), James Pierce ("Pierce"), Cliff Pruett ("Pruett"), and Richard Conley ("Conley"). For the reasons discussed below, defendants' motion is GRANTED in part and DENIED in part.

Background

Plaintiffs Jack Cummings ("Cummings"), Ralph Best ("Best"), Billy Rodgers ("Rodgers"), Bruce Henry ("Henry"), and Terry Walters ("Walters") are former employees of the Dekalb County Water & Sewer Department, Planning and Engineering Division ("Planning and Engineering"). Plaintiffs were terminated in March, 1990, when the Dekalb County Board of Commissioners ("Board") adopted the 1990 County budged. As part of that budgetary process, the Board voted not to appropriate funds for any of the positions in Planning and Engineering, including plaintiffs', and in fact abolished the Water & Sewer Department in its entirety.

According to defendants, the Board's action was the culmination of a process which began with a December 12, 1989 recommendation by defendant Pruett, the former Associate Director of Public Works, Water & Sewer, to County Chief Executive Officer, Manuel Maloof ("Maloof"). Pruett recommended that the 34 positions in Planning & Engineering be eliminated, as part of an overall reorganization of the department. On December 15, 1989, Maloof submitted the budget, with that proposal, to the Board. The Board, however, failed to approve Maloof's recommendation as to the elimination of Planning and Engineering and the 34 positions. Rather, at its February 27, 1990 meeting, the Board recommended that Planning and Engineering not be discontinued, pending expeditious study. Soon thereafter, Maloof vetoed the Board's decision, and as a result, all Planning and Engineering positions were eliminated from the 1990 budget. On March 13, 1990, the Board considered overriding Maloof's veto, which would require a two-thirds vote (i.e., five) of the seven Board members. The attempted override failed, however, and as a result, plaintiffs were notified by Pruett on March 14, 1990 that their employment would be terminated, effective March 16, 1990.[1]

Plaintiffs appealed their termination pursuant to the provisions of the Dekalb County Code, by filing a written letter of appeal to defendant Conley, the County's Merit System and Personnel Administration Director. Specifically, plaintiffs requested a hearing before the Personnel Review Panel ("the Panel") pursuant to Dekalb County

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[1] The termination notices were approved by defendant Pierce, who then was the Executive Assistant to Manuel Maloof.

Code § 20-196, which authorizes reviews of dismissals due to a reduction-in-force. Under that section, the Panel is to consider whether plaintiffs' terminations were due to lack of work, lack of funds, abolishment of positions or for other material changes in duties or organizations or appropriation of funds. The Panel also is authorized, under its administrative procedures, to consider whether the terminations were a "subterfuge" for discrimination.

Plaintiffs also requested a hearing before the Panel under Dekalb County Code § 20-194, which authorizes review of actions considered discriminatory.[2] Plaintiffs Cummings, Best, Rodgers and Henry alleged that their terminations were discriminatory on the basis of age, and plaintiffs Cummings, Henry and Walters alleged that their terminations were discriminatory on the basis of opinion. Defendant Conley determined that those alleging age discrimination met the criteria set forth in § 20-194 and that Cummings, but not Henry or Walters, met the criteria set forth in § 20-194 to pursue his claim of discrimination on the basis of opinion.[3]

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[2] Section 20-194 provides in relevant part: "Any employee who believes unjust discrimination has been exercised in any phase of employment because of race, color, religion, national origin, sex, political affiliation or opinion, age, handicap or other nonmerit factor may appeal to the personnel review panel within ten (10) days of the action. . . . "

[3] For example, Conley required those plaintiffs alleging discrimination on the basis of opinion to provide clarifying information relative to their allegations. Although Henry and Walters did so, Conley determined that they had not met the requirements of Code Section 20-194, which requires a detailed description of the alleged discrimination. Conley therefore declined their appeals on the basis of opinion.

Plaintiffs' claims were consolidated into a single hearing before the Panel, which took place on May 17 and 18, 1990. The Panel is a body established by the Dekalb County Code to hear appeals of disciplinary, discriminatory and reduction-in-force actions. The Panel is composed of three randomly selected County employees. The Panel performs "quasi-judicial" functions, and its decisions may, but are not required to, be appealed by writ of certiorari to the Dekalb County Superior Court. At the hearing, plaintiffs were represented by counsel, who called witnesses and introduced documentary evidence in plaintiffs' behalf, cross-examined the County's witnesses, and made a closing argument. The proceedings were under oath, and taken down by a court reporter.

On May 21, 1990, the panel unanimously affirmed plaintiffs' termination, making four findings of fact:

> (1) there was a decreasing need for planning, design and engineering functions. As a result, there was a shifting of emphasis which led to a reorganization within the Water & Sewer Division;
>
> (2) the elimination of Planning & Engineering would result in greater cost control and a considerable annualized cost savings to the County;
>
> (3) the Board did not appropriate funds for Planning and Engineering for 1990; and
>
> (4) the motivating reasons for plaintiffs' terminations were not age, differences of opinion, or any other nonmerit factor.

Based on these findings, the Board affirmed the decisions to terminate plaintiffs' employment as part of a reduction-in-force. This lawsuit followed.

In their complaint, brought under 42 U.S.C.A. § 1983 and the Georgia Constitution, plaintiffs allege that defendants violated their First Amendment right to free speech and right of association, and their Fourteenth Amendment rights to substantive due process and equal protection. Plaintiffs also apparently assert a breach of contract claim under state law. Defendants are the County, as well as three of its employees, Pierce, Pruett and Conley, who are sued in their individual and official capacities.

Defendants contend that summary judgment is warranted on a number of grounds. Specifically, defendants contend that summary judgment is appropriate because: (1) res judicata bars plaintiffs' claims; (2) plaintiffs have failed to offer any evidence in support of their section 1983 claims; (3) defendants cannot be held liable in their official capacities, as there was no custom or policy which was the moving force behind the alleged constitutional deprivations; (4) the individual defendants cannot be held liable in their individual capacities on the grounds of qualified immunity; (5) the County cannot be liable on the basis of legislative immunity; (6) this court lacks pendent jurisdiction over plaintiffs' state claims; (7) plaintiffs' state claims are barred by sovereign and governmental immunity; and (8) plaintiffs' state claims against the County are time-barred.

DISCUSSION

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co,* 802 F.2d 1352, 1356 (11th Cir. 1986); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung,* 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion, *Carlin Communication,* 802 F.2d at 1356; *Sweat v. Miller Brewing Co.,* 708 F.2d 655, 656 (11th Cir. 1983).

In its definitive summary judgment trilogy, the Supreme Court addressed the burdens of proof which each party must carry on a motion for summary judgment and stated that:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The nonmoving party is required to identify specific facts which demonstrate that

there is a genuine issue for trial and may not rest on the allegations or denials in its pleading. *Celotex*, 106 S.Ct. at 2553, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In order to survive a defendant's motion, however, plaintiff need not prove its case. Rather, it need only to present evidence from which a jury might return a verdict in its favor. If it does so, there is a genuine issue of fact that requires a trial. *Anderson*, 106 S.Ct. at 2514-15.

1. Issue Preclusion By Administrative Action[4]

In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), the United States Supreme extended its prior holding in *Allen v. McCurray*, 449 U.S. 90 (1980), that state court *judgments* are entitled to issue preclusive effect in subsequent actions under 42 U.S.C.A. § 1983, to administrative decisions. As stated by the Supreme Court:

> [W]hen a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions

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[4] Res judicata, which refers to the preclusive effects of former adjudications, consists of two concepts: issue and claim preclusion. Issue preclusion, often referred to as collateral estoppel, refers to the effect of a prior judgment in foreclosing relitigation of an issue that was actually decided in the prior lawsuit after a full and fair opportunity for litigation. Claim preclusion refers to the effect of a prior judgment in foreclosing litigation of a matter that was not litigated in the prior lawsuit, but which should have been advanced by the parties. *Gjellum v. Birmingham*, 829 F. 2d 1056, 1059 n. 3 (11th Cir. 1987). In this case, the court is concerned with issue preclusion.

> under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled in the state courts.

478 U.S. at 789.

In order to recognize the issue preclusive effect of a state administrative decision, however, the court must determine that the state agency: (1) acting in a judicial capacity, (2) resolved issues of fact properly before it, (3) which the parties had an adequate opportunity to litigate. *Id.* at 797-98, *citing, United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966). If these three factors are met, then the court must determine what preclusive effect would be afforded the agency decision under state law, and must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts. *Id.* at 799; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Nix v. Hardison*, 712 F. Supp. 185, 188 (N.D. Ga. 1989), *aff'd without op.*, 891 F.2d 906 (11th Cir. 1989).

This court need not decide what preclusive effect would be given to the agency decision under state law inasmuch as the court finds that plaintiffs did not have an adequate opportunity to litigate the section 1983 issues in the administrative action.[5] Although plaintiffs were

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[5] The court notes, however, that it appears that Georgia courts would give little, if any, preclusive effect to the administrative decision. In *Flournoy v. Akridge*, 198 Ga. App. 86 (1990), the court held that the factfinding process in a section 1983 action is unique such that an employee would not have the opportunity to litigate necessary facts and issues to such a claim

afforded a full adversarial hearing before an administrative panel acting in a judicial capacity, the evidence as to plaintiffs' claims of discrimination was substantially circumscribed. As an initial matter, Conley failed to permit two of the plaintiffs to present any evidence whatsoever on their claims of discrimination on the basis of opinion, and limited the claims of one plaintiff to information presented in his clarifying letter. Moreover, during the hearing, defendants' counsel objected to plaintiffs' introduction of evidence as to alleged discrimination each time it occurred. For example, defendants objected to plaintiffs' introduction of evidence as to a previous lawsuit filed by a former County employee, Maury Winkler. In plaintiffs' lawsuit, however, they allege that, as part of the violation of their constitutional rights, defendants abolished their department to retaliate against Winkler and those who associated with him, i.e., plaintiffs. Additionally, defendants objected to Cummings' testimony as to why he believed the reduction-in-force took place. Although there was some evidence introduced as to these

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in an administrative hearing which was geared to a separate type cause of action. Nevertheless, Georgia law does provide preclusive effect to administrative decisions of the State Personnel Board, assuming the prerequisites to res judicata have been met. *Woods v. Delta Air Lines, Inc.*, 237 Ga. 332 (1976). The Georgia courts apparently have not reconciled these two lines of decision.

In *Steadham v. Sanders*, 941 F. 2d 1534, 1537 (11th Cir. 1991), however, the Eleventh Circuit held that, in the absence of clear direction to the contrary from the state legislature or state courts (therein Alabama), a county commission's factual finding will not have preclusive effect. In Georgia, as in Alabama, there does not appear to be any such directive.

issues, plaintiffs' attempts to fully explain the reasons for their discharges were substantially limited. Moreover, there was little testimony, if any, as to plaintiffs' age discrimination claims. While the court finds it to be a close question, the court's review of the transcript of the hearing establishes that plaintiffs did not have an adequate opportunity to litigate their section 1983 claims, and as such, the administrative findings will not be given preclusive effect.[6]

Moreover, even if defendants established as a matter of law that plaintiffs had an adequate opportunity to litigate their constitutional claims, the court still would have to determine what preclusive effect would be afforded the decision of the Panel under state law. *Nix*, 712 F. Supp. at 188. The court finds that, under Georgia law, the decision of the county personnel board would not be given preclusive effect in a subsequent action under 42 U.S.C.A. § 1983. *Flournoy*, 198 Ga. App. at 88. As stated by the court in *Flournoy*:

> [T]he factfinding process in a Section 1983 action is unique to the cause of action such that the appellant did not have the opportunity to litigate necessary facts and issues to that claim

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[6] The administrative hearing in this case was quite unlike those hearings in cases which have found that the parties had an adequate opportunity to litigate their claims. For example, in *Johnson v. City of Tarpon Springs*, 758 F. Supp. 1473 (M.D. Fla. 1991), the Civil Service Board adopted the lengthy and detailed twenty-six findings of fact of the hearing officer, after a hearing in which plaintiff was allowed fully to present his evidence. The four sparse findings of the Panel in this case simply pale in comparison, and do not establish that plaintiffs had an adequate opportunity to, or did, litigate fully their section 1983 claims.

in an administrative hearing geared toward an entirely separate cause of action.

Additionally, it is apparent that the Eleventh Circuit takes a dim view of issue preclusion in section 1983 cases involving unreviewed state agency decisions. As recognized by the court in *Gjellum*, 829 F.2d at 1067, the federal interests in providing a forum for those who allege a violation of their federal rights must prevail where, as in this case, the full faith and credit statute is inapplicable. After a lengthy discussion of the importance of federal court involvement in section 1983 cases, the *Gjellum* court, instructed that, even in issue (as opposed to claim) preclusion cases, where the agency acted in a judicial capacity and resolved disputed issues of fact before it which the parties had an adequate opportunity to litigate, the district court nevertheless may consider whether any federal preclusion requirements would allow relitigating any factifinding of the agency. 829 F.2d at 1070. *See also, JSK v. Hendry County School Board*, 941 F.2d 1563, 1566 (11th Cir. 1991) (recognizing that Supreme Court's decision in *Elliott* was largely policy-based, and declining to apply *Elliott* rationale to administrative decision of state agency in case arising under Education for All Handicapped Children Act); *Steadham*, 941 F.2d at 1536-37 (concluding that Alabama courts would not give issue preclusive effect to unreviewed state agency decision in section 1983 case, as there is no clear directive from courts or legislature); *Delgado v. Lockheed Georgia Co.*, 815 F.2d 641 (11th Cir. 1987) (recognizing that in Title VII and the Age Discrimination in Employment Act suits, federal

common law of preclusion should not apply to unreviewed state administrative factfinding under *Elliott* rationale).

Accordingly, the court finds that plaintiffs' claims are not precluded by the prior administrative decision of the Panel. As such, defendants are not entitled to summary judgment on that basis.

2. Plaintiffs' Alleged Failure To State A Claim

Defendants contend that summary judgment is appropriate on plaintiffs' section 1983 claims, as plaintiffs failed to state a section 1983 claim.[7] In support of their motion, defendants contend that plaintiffs have offered no evidentiary support for their claims, and as such, the claims should be dismissed.

Plaintiffs' claims under section 1983 include claims for violation of their rights to free speech and association under the First Amendment, and violations of their rights to equal protection and substantive due process under the Fourteenth Amendment. While it is somewhat difficult to discern the factual bases for plaintiffs' claims given plaintiffs' sparse responses to defendants' interrogatories, it appears that plaintiffs' section 1983 claims are based, at least in part, on the fact that defendants

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[7] Defendants' argument appears to be more appropriate to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court notes that, on a motion for summary judgment, the relevant inquiry is whether there are genuine issues of material fact such that a reasonable jury could find in favor of either party.

terminated Planning and Engineering in an effort to get rid of another employee in that division, Maury Winkler. Plaintiffs contend that they were terminated for their associations with Mr. Winkler, and that the stated reasons for their terminations were bogus and pretextual.

In order to survive summary judgment, however, plaintiffs may not rely on the mere allegations of their complaint, but must present concrete evidence in the form of specific facts sufficient to support their claims. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). To establish a claim under section 1983, plaintiffs must show that defendants deprived them of rights secured by the laws or Constitution of the United States, and that defendants were acting under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

Plaintiffs have not identified any facts to support their claims for violations of their First Amendment rights to free speech. Indeed, the evidence is devoid of any alleged statements by plaintiffs which would support such a claim, and it appears that plaintiff abandoned their free speech claims in response to defendants' motion for summary judgment. As such, summary judgment is warranted on plaintiffs' First Amendment – free speech claims.

Plaintiffs' have presented evidence, however, to support their First Amendment claims that they were terminated as a result of their association with Mr. Winkler. There is some evidence that defendants Dekalb County, through its then Chief Executive Officer, Manuel Maloof, and Pierce and Pruett, wanted to get rid of Mr. Winkler, and those who supported him. Statements allegedly

made by defendants reveal an intent to "get" Mr. Winkler, and to eliminate Planning and Engineering so that it could be reconstituted under a different name, with a manager other than Mr. Winkler. Despite the budgetary reasons advanced for the decision, at the administrative hearing, defendants were unable to provide any details as to the need for the elimination of Planning and Engineering. The evidence, while weak, creates a genuine issue of material fact as to the reasons for the elimination of plaintiffs' positions, including an issue as to whether Planning and Engineering was eliminated to retaliate against not only Winkler, but those associated with him. As a result, summary judgment is not appropriate on plaintiffs' section 1983 claims for violations of their First Amendment rights to freedom of association.

Likewise, summary judgment is not warranted on plaintiffs' substantive due process claims, as there is a genuine issue of material fact as to the reasons for plaintiffs' job elimination. In this Circuit, deprivation of a property interest for an improper motive and by means that are pretextual, arbitrary and capricious constitutes a substantive due process violation. *Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571, 1577 (11th Cir. 1983); *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982). Defendants do not dispute that plaintiffs had a property interest in their jobs under relevant provisions of the Dekalb County Ordinance, which require that merit employees be dismissed only for cause. Given the disputed evidence as to the reasons for plaintiffs' termination from employment, and the need (or lack of it) for the elimination of their division, summary judgment is

not warranted on plaintiffs' substantive due process claims.

Plaintiffs, however, have not offered any evidence in support of their Fourteenth Amendment equal protection claim. Rather, in their complaint, plaintiffs merely asserted that defendants' actions as alleged therein violated plaintiffs' rights to equal protection. Plaintiffs' interrogatory responses provide little, if any, evidence in support of their equal protection claims. In response to defendants' motion for summary judgment, however, plaintiffs contend that their equal protection claims arise from the differences in the reduction-in-force which is the subject of this lawsuit, and the reduction-in-force conducted by defendants in the early 1980s. Apparently, plaintiffs contend that defendants unequally administered facially neutral legislation (or policy), thereby violating their equal protection rights. *See MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1559 (11th Cir. 1991). To establish their claims, however, plaintiffs must show that distinctions between similarly situated persons were not rational, but arbitrary and not substantially related to the object of the legislation. *Id.*

This plaintiffs have failed to do. There is simply no evidence offered by plaintiffs that the reduction-in-force herein and any earlier ones were similar or not, or that the policies in effect now, and then, were similar or not. In short, after reviewing the record, the court finds that there simply is no evidence to support plaintiffs' equal

protection claims. As such, summary judgment is appropriate on plaintiffs' equal protection claims.[8]

Thus, the court GRANTS defendants' motion for summary judgment with respect to plaintiffs' section 1983 free speech and equal protection claims, but DENIES defendants' motion with respect to plaintiffs' free association and substantive due process claims.

3. Official Capacities

Defendants next contend that the County and the individual defendants cannot be liable in their official capacities as a matter of law inasmuch as plaintiffs have not shown that the alleged constitutional deprivations were pursuant to an official policy or custom, as required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

With respect to the County, liability under section 1983 may be imposed when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 691; *Parker v. Williams*, 862 F.2d 1471, 1477 (11th Cir. 1989). For the County to be liable, there must be a causal connection between the county's responsibilities and the

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[8] The court does not find that the affidavit of Bruce Henry creates an issue of fact as to plaintiffs' equal protection claims. There is no evidence that Mr. Henry was involved in, or had any personal knowledge whatsoever of, any previous reduction-in-force.

plaintiffs' injuries, and an act can satisfy this causation requirement if it was the "moving force" of the constitutional violation. *Id.* In other words, the County can be liable if there was an established county policy, or a policy made by those whose edicts or acts may fairly be said to represent official policy, such that plaintiffs were injured thereby. *Parker*, 862 F.2d at 1478. *See also, Byrd v. City of Atlanta*, 683 F. Supp. 804, 808 (N.D. Ga. 1988) (recognizing that municipal liability attaches where a deliberate choice to follow a course of action is made by the official or officials responsible for establishing final policy with respect to the issue in question). Under these decisions, the court finds that the actions of the Board of Commissioners and the individual defendants, if found to be unlawful and violative of plaintiffs' constitutional rights, represented the official policy of the County at the various phases of the allegedly unlawful decisions, and as such, the County may be liable.

Defendants have not shown that defendants Pierce, Pruett and Conley did not possess final decision-making authority over the matters in question. While Pierce and Pruett did not have final decision-making authority over the budget, they did recommend that Planning and Engineering be eliminated. Moreover, they had such authority in regards to plaintiffs' terminations. Indeed, the termination letters from Pruett, approved by Pierce, state "I informed you of my intent to terminate your services, and provided you with an opportunity to offer a response. . . . I am, therefore, terminating your services. . . . " As such, Pierce and Pruett can be held liable

in their official capacities, assuming plaintiffs' constitutional rights were violated. Likewise, Conley, who is Personnel Director for the County, is responsible for the administration of the County's merit system and personnel office. Plaintiff Walters claims that Conley unlawfully required Walters to waive his rights to complain of a demotion before he could obtain a demotion or transfer. In this regard, Conley likewise had final decision-making authority, and assuming his acts were unlawful, they were done in his official capacity. Accordingly, plaintiffs have established that actions by all defendants represented the official policy of the County, and defendants' challenge to the proper "official capacity" parties is without merit. *Byrd,* 683 F. Supp. at 808.

4. Qualified Immunity

The doctrine of qualified immunity protects governmental officials who are sued in their individual capacities insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton,* 483 U.S. 635 (1987); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Smith v. Turner,* 764 F. Supp. 632 (N.D. Ga. 1991). When considering this defense, the court must undertake a two-part analysis: (1) the public officials, here Pierce, Pruett, and Conley, must prove that they were acting within the scope of their discretionary authority when the allegedly wrongful acts occurred and (2) plaintiffs then must establish the defendants' lack of

good faith, i.e., that defendants' actions, if proven, violated clearly established constitutional law. *Lowe v. Aldridge*, 958 F.2d 1565, 1569-70 (11th Cir. 1992).

In order for a right to be clearly established and therefore defeat an official's claim to qualified immunity,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Id., quoting, Anderson, 483 U.S. at 642.

The court has found that plaintiffs have produced sufficient evidence to create a genuine issue of fact as to the reasons for plaintiffs' termination from employment. Assuming plaintiffs were terminated because of their age or because of their associations in violation of the Fourteenth and First Amendments, it cannot be doubted that Pierce and Pruett violated clearly established laws of which a reasonable public official would have known. Moreover, assuming Conley required Walters to waive an otherwise given right to apply for and accept a transfer, in violation of Dekalb County ordinances, the court believes that Conley likewise could not take advantage of the qualified immunity defense. Accordingly, defendants are not entitled to summary judgment on the basis of qualified immunity.

5. Legislative Immunity

Defendants, relying solely on a non-binding decision from the Fourth Circuit Court of Appeals (and misciting decisions from this Circuit)[9], contends that plaintiffs' claims against the County are barred by the doctrine of legislative immunity. In this Circuit, while it is true that local legislators (i.e., the County's Board of Commissioners) would be absolutely immune from suit for their legislative activities, this is not true of the County. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1194-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). Indeed, the court in *Hernandez*, relying on the United States Supreme Court's decision in *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), held that a city is not entitled to absolute legislative immunity from liability for damages flowing from their constitutional violations. Accordingly, the County is not entitled to summary judgment on the basis of legislative immunity.

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[9] For example, defendants contend that the decision in *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir. 1989) stands for the proposition that the purpose of legislative immunity is to prevent legislators from having to testify regarding matters of legislative conduct. The opinion is notably silent in that regard, however, and defendants simply are relying on a non-binding decision from the Fourth Circuit in support of their legislative immunity argument.

5. [sic] Plaintiffs' State Claims Against the County

Defendants argue that this court lacks supplemental jurisdiction over plaintiffs' state law claims under 28 U.S.C.A. § 1367 inasmuch as all the federal claims should be dismissed.[10] Because the court finds that at least some of plaintiffs' federal claims remain viable, and because the state claims are so related to the federal claims, the court will exercise its supplemental jurisdiction over the state claims.

Defendants nevertheless contend that state sovereign immunity bars plaintiffs from pursuing their state claims against the County. The court agrees. O.C.G.A. § 36-1-4 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." *See Nelson v. Spalding County,* 249 Ga. 334 (1982) (recognizing sovereign immunity of county). An exception to this general rule is provided in Art. I, Sec. II, Par. IX of the state Constitution, which provides that the defense of sovereign immunity is waived as to any claims for which liability insurance has been provided. *Early County v. Fincher,* 184 Ga. App. 47, 48 (1987). In this case, there is no evidence that liability insurance has been provided for

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[10] 28 U.S.C.A. § 1367 provides in part that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . . " Under § 1367(c), the court may decline to exercise jurisdiction of the state claims if, inter alia, the court has dismissed all claims over which it had original jurisdiction.

claims of constitutional deprivations, nor has such a suit been authorized by statute.

Although plaintiffs rely on a number of decisions authorizing suits against a municipality, *see, e.g., McCrary Engineering Corp. v. City of Bowdon*, 170 Ga. App. 462 (1984), these decisions are inapposite, as the liability of municipalities is quite different from that of counties. *Early County*, 184 Ga. App. at 49. Thus, the court finds that plaintiffs' state claims against the County are barred.[11]

Even if plaintiffs' state claims against Dekalb County were not barred by sovereign immunity, the claims would be barred for plaintiffs' failure to file suit within twelve months of the claims' accrual. O.C.G.A. § 36-11-1 provides that "all claims against counties must be presented within 12 months after they accrue or become payable or the same are barred. . . . " Plaintiffs were terminated effective March 16, 1990. Plaintiffs thus could have first maintained their action to a successful result on that date.[12] Plaintiffs did not file suit, however, until May 13,

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[11] While it is unclear under Georgia law, it appears that a county may nevertheless be sued when it violates a constitutional right of a citizen. *Waters v. Dekalb County*, 208 Ga. 741, 745 (1952); *Baranan v. Fulton County*, 232 Ga. 852 (1974). Although these cases involved only takings, there is no language limiting the scope of the decisions. Nevertheless, the parties failed to argue this point, and given the court's ruling below, it becomes immaterial.

[12] Although plaintiffs state that they could not have filed suit until the Panel's decision, as they were required to exhaust administrative remedies, plaintiffs fail to cite any pertinent case to support their argument. As a general rule, in employment

1991, more than twelve months after their claims accrued. As such, plaintiffs' state claims against the county are barred in their entirety.

6. Plaintiffs' State Claims Against the Individual Defendants

Defendants contend that plaintiffs' state claims against the individual defendants in their official capacities are barred on the basis of governmental immunity. In this state, the general rule is that "[a]ny suit against an officer or agent of the State, in his official capacity, in which a judgement can be rendered controlling the action or property of the State in a manner not prescribed by statute, is a suit against the State," and therefore it cannot be maintained without the state's consent. *Hennessy v. Webb*, 245 Ga. 329 (1980). Thus, when a governmental official is invested with discretion and is empowered to exercise his judgment over a particular matter in question, he generally is immune from suit by persons who were injured as a result of an erroneous decision. *Id.*

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cases, a cause of action accrues at the time of the last discriminatory act, not the point at which the consequences of the act become apparent. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Calhoun v. Federal National Mortgage Association*, 823 F.2d 451, 455 (11th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988). Plaintiffs have not cited any Georgia authority which requires that the statute of limitations be tolled while the parties pursue grievance procedures. *Compare, Rubin v. O'Koren*, 644 F.2d 1023, 1025-26 (5th Cir. 1981) (applying Alabama law). In this case, plaintiffs do not claim that any civil rights violations occurred during the grievance procedure; rather, they complain only of the discriminatory nature of defendants' decision to terminate them, and all other members of Planning and Engineering.

Nevertheless, governmental officials are immune from suit only for "negligent acts, not for malicious acts, acts of corruption, wilful acts, or acts involving reckless disregard for the safety of others." *Logue v. Wright*, 260 Ga. 206-07 (1990); *Hennessy*, 245 Ga. at 331. Although defendants correctly argue that the acts alleged by plaintiffs were discretionary in nature, there remains a disputed issue of fact as to whether defendants wilfully and/or maliciously violated plaintiffs' constitutional rights. Thus, the individual defendants cannot take advantage of the governmental immunity defense in this case, and plaintiffs' state law claims against them are not barred on that basis.

CONCLUSION

In conclusion, the court GRANTS in part and DENIES in part defendants' motion for summary judgment. Specifically, the court GRANTS defendants' motion with respect to plaintiffs' section 1983 claims for violations of their rights to free speech and equal protection, and GRANTS the motion for summary judgment of Dekalb County with respect to all of plaintiff's state law claims. The court DENIES defendants' motion with respect to plaintiffs' section 1983 claims for violations of their rights to freedom of association and substantive due

process, and DENIES the motion of the individual defendants' with respect to plaintiffs' state law claims.[13]

SO ORDERED this 26th day of February, 1993.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

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[13] For the clerk of the court's convenience, the court has GRANTED in part and DENIED in part defendants' motion for summary judgment [# 10].